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No. 94-1175

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1995

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BANK ONE, CHICAGO, N.A.,  
*Petitioner,*  
v.

MIDWEST BANK & TRUST COMPANY,  
an Illinois Banking Corporation,  
*Respondent.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF  
THE ELECTRONIC CHECK CLEARING HOUSE  
ORGANIZATION AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

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August 31, 1995

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

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*Amicus*, the Electronic Check Clearing House Organization ("ECCHO"), respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of petitioner. Consent to file this brief has been obtained from counsel for petitioner Bank One, Chicago, N.A.\* Counsel for respondent Midwest Bank & Trust Company has declined to consent.

The United States Court of Appeals for the Seventh Circuit held below that the federal district courts do not have original jurisdiction to hear disputes between depository institutions arising under the Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.* (the "EFAA"). Fur-

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\* Correspondence reflecting the consent of petitioner has been filed with the Clerk of the Court.

ther, the court of appeals held that the appropriate forum for resolution of such disputes is the Board of Governors of the Federal Reserve System (the "Federal Reserve"), or alternatively, perhaps the state courts. The court of appeals not only has erroneously construed the EFAA, but has unilaterally conferred the authority to adjudicate inter-bank check clearing disputes on the nation's largest provider of check-clearing services, the Federal Reserve.

ECCHO is a not-for-profit nationwide bank clearing house whose current membership consists of 78 banks representing approximately 70 percent of the deposits of the 100 largest banks in the United States. ECCHO has established the legal and operational framework under which its member banks collect checks among themselves electronically, through the exchange of electronic information about the checks with the paper checks to follow. Electronic check clearing offers a number of advantages, including the substantial acceleration of the transmission of information about checks and their return. It is estimated that, on an annualized basis for 1995, checks valued at approximately \$244 billion will be collected through the ECCHO system.

The Federal Reserve and ECCHO are currently the two principal providers of nationwide electronic check clearing services in the United States.

ECCHO's rules governing electronic check clearing among its members are governed by and are subject to the EFAA and the Federal Reserve's Regulation CC implementing the EFAA, 12 C.F.R. Pt. 229 ("Regulation CC"). Disputes between ECCHO member banks with respect to checks collected under the ECCHO system inevitably will involve disputes under Regulation CC. Accordingly, ECCHO and its member banks are directly affected by the court of appeals' decision that the federal courts do not have jurisdiction to resolve inter-bank check clearing disputes under the EFAA and Regulation CC. Furthermore, ECCHO has a particular interest in a hold-

ing that its principal competitor, the Federal Reserve, is the sole federal forum for adjudication of inter-bank check clearing disputes under the EFAA and Regulation CC. In the Monetary Control Act of 1980, Title I, Pub. L. No. 96-221, 94 Stat. 140 (1980) ("MCA"), Congress established detailed rules governing the Federal Reserve's provision of check collection services in competition with private sector providers, such as ECCHO. It is inconceivable that only seven years later Congress intended in the EFAA to so fundamentally alter this competitive balance between the Federal Reserve and the private sector established in the MCA by authorizing the Federal Reserve to serve as adjudicator of inter-bank disputes, without any indication of such intent in the EFAA or its legislative history.

For the foregoing reasons, the motion by ECCHO for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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### QUESTION PRESENTED FOR REVIEW

Whether, despite the express grant of jurisdiction to the United States district courts in the EFAA, the Seventh Circuit erred in determining that banks cannot pursue the cause of action created by the Federal Reserve pursuant to the Congressional delegation of authority contained in the EFAA.

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**BRIEF OF THE ELECTRONIC CHECK CLEARING  
HOUSE ORGANIZATION AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

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**INTEREST OF AMICUS CURIAE**

The Electronic Check Clearing House Organization ("ECCHO") is a not-for-profit nationwide bank clearing house founded in 1990 dedicated to promoting electronic check collection and related payments system improvements. ECCHO's current membership consists of 78 banks located throughout the United States representing approximately 70% of the deposits of the nation's 100 largest banks. A list of ECCHO's current membership is provided in the Appendix.

ECCHO has established the legal and operational framework under which banks participating in the ECCHO system collect checks among themselves through



the exchange of electronic information. The conversion of paper checks into electronic information and the subsequent transmission of such electronic information to the bank paying the check is known as electronic check presentment or "ECP." ECP offers a number of advantages, including the acceleration of the collection of the check and the transmission of information about whether the check will be paid or dishonored, as well as the potential reduction of expenses associated with the collection and return of the check. It is estimated that, on an annualized basis for 1995, approximately 240 million checks with a value of approximately \$244 billion will be collected through the ECCHO system. In addition to its existing ECP services, ECCHO also is engaged in significant research and development efforts to apply other emerging technologies, such as image and other computer-based technology, toward improving the nation's check collection system.

ECCHO and the Federal Reserve System (the "Federal Reserve") currently are the two principal competing providers of nationwide ECP services.<sup>1</sup>

ECCHO is concerned that the Seventh Circuit's holding that the Federal Reserve is authorized to adjudicate disputes under the Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.* ("EFAA"), and the Federal Reserve's Regulation CC implementing the EFAA, 12 C.F.R. Pt. 229 ("Regulation CC"), will, contrary to Congress' intent, tip the balance established by Congress governing the competition between the Federal Reserve and ECCHO with respect to the operation and develop-

<sup>1</sup> While certain local check clearing houses also provide ECP services, these services generally are available only where both the bank presenting the check and the bank paying the check are located in the same geographic region serviced by the local clearing house. ECCHO and the Federal Reserve currently are the principal two providers of ECP services that can be used by a bank to present checks to another bank, regardless of the banks' locations.

ment of ECP against ECCHO and in favor of the Federal Reserve.

### SUMMARY OF ARGUMENT

The Seventh Circuit's holding that the federal courts do not have original jurisdiction to hear inter-bank disputes arising under the EFAA and Regulation CC, and that the Federal Reserve is the only federal forum available to resolve such disputes, is an erroneous interpretation of the EFAA. The Seventh Circuit's holding is without legal basis and is wholly inconsistent with the role established by Congress for the Federal Reserve as a competitor in the market for check clearing services. It is inconceivable that Congress, which had seven years previously explicitly delineated detailed rules governing the Federal Reserve's competition with private sector providers of check collection services, intended in the EFAA to so fundamentally alter the Federal Reserve's role by authorizing it to serve as adjudicator of such disputes, without any indication of such intent in the EFAA or its legislative history.

### ARGUMENT

A major part of the business of commercial banking in the United States involves the transfer of funds among checking accounts of bank customers. *See* H. J. Bailey & R. B. Hagedorn, *Brady on Bank Checks* § 11.4 at 11-6 (7th ed. 1992). These transfers are typically effected through the use of checks written by the bank's customers.<sup>2</sup> The check represents the instruction of the "drawer" of the check to its bank to pay to the "payee" of the check (or a subsequent transferee) the amount specified on the check and to charge the drawer's account for such amount. For over 100 years, the check collec-

<sup>2</sup> In calendar year 1993, approximately 59.4 billion commercial (exclusive of government) checks were written. Bank For International Settlements, *Payment Systems in the Group of 10 Countries* 110 (1994).



tion process has involved the physical delivery of paper checks between banks as the means by which banks transmit to each other, and consequently act upon, the payment instructions embodied in checks.

In a simple check transaction, a payee receives a check as payment from a drawer. The payee then deposits that check in the payee's deposit account at its bank, called under Regulation CC the "depository bank," and waits for the check to "clear" so that the payee can have access to the deposited funds. The check clearing process begins when the depository bank sends the checks directly, or more typically through one or more other intermediary collecting banks, to the drawer's bank, called under Regulation CC the "paying bank." The paying bank determines whether to pay the check, generally based on the amount of funds in the drawer's deposit account. If the paying bank pays the check, it debits the drawer's account and pays the depository bank (or intermediary collecting bank). If the paying bank determines there are insufficient funds in the drawer's account to cover the check, for example, it may determine not to pay the check, *i.e.*, to dishonor the check. In this event, the paying bank returns the check to the depository bank, and in certain cases also is required to notify the depository bank that the check will be returned. Upon receipt of the returned check or notice, the depository bank notifies its customer, the payee, that the check has "bounced" and will attempt to recover any credit the depository bank previously had provided to the payee in connection with the check. This process of check clearing (including the return of the check to the depository bank) could take several days because there may be several intermediary collecting banks handling the check between the depository bank and the paying bank, and because the check must be transported physically to each bank in this check-clearing chain.

The importance of this process to the viability of the national economy is recognized by Congress, as evidenced by Congress' granting to the Federal Reserve in 1913

when it enacted the Federal Reserve Act, 12 U.S.C. 221 *et seq.*, the authority to participate in the nationwide process of check clearing. Between 1913 and 1980, the Federal Reserve offered, in addition to other payments system services, check clearing services<sup>3</sup> without charge to Federal Reserve member banks.<sup>4</sup> In the Monetary Control Act of 1980 (the "MCA"),<sup>5</sup> Congress determined that all depository institutions in the United States, regardless of whether they were Federal Reserve member banks, would be required to maintain reserves with the Federal Reserve.<sup>6</sup> In return, they received the right to obtain payment services, including check collection services, directly from the Federal Reserve. In order to promote the efficiency that would result from fair competition between the Federal Reserve and private sector providers of payment services, Congress required the Federal Reserve to charge all depository institutions a market-equivalent rate for its payments services and to comply

<sup>3</sup> These check clearing services essentially consisted of receiving checks from depository banks, or other collecting banks to which depository banks had sent the checks, and transporting these checks to paying banks. The Federal Reserve similarly would transport checks that the paying banks had determined to return unpaid to depository banks. The Federal Reserve would debit and credit, respectively, accounts these banks maintained with the Federal Reserve to effect the inter-bank payments associated with these checks.

<sup>4</sup> Federal Reserve member banks include all national banks and those state-chartered banks that elect to become members of the Federal Reserve. 12 U.S.C. 222 (national banks), 321 (state-chartered banks). Prior to 1980, only Federal Reserve member banks were required to maintain non-interest bearing reserves with the Federal Reserve. In return, these banks received payment services free of charge from the Federal Reserve. Nonmember banks did not prior to 1980 have direct access to Federal Reserve payment services, including its check clearing services.

<sup>5</sup> Title I of Pub. L. No. 96-221, 94 Stat. 140 (1980).

<sup>6</sup> 12 U.S.C. 461 (1988 & Supp. V 1993).

with certain other competition-promoting requirements.<sup>7</sup> Thus, since 1980, the Federal Reserve has been a direct competitor of banks with respect to its payments system services, including check clearing, in accordance with the current rules established by Congress to govern this competition.

Further, in 1987, Congress determined that in certain cases banks were unduly delaying customers' access to funds represented by checks they had deposited and, in the EFAA, mandated funds availability schedules and delegated to the Federal Reserve the authority to implement these schedules.<sup>8</sup> The Federal Reserve also was authorized to promulgate rules governing the check collection and return system, in order to attempt to ensure that the depository bank generally had received any check returns or had otherwise learned of the returned check

<sup>7</sup> 12 U.S.C. 248a(c). These requirements are detailed in the Federal Reserve's pricing principles, which the MCA required the Federal Reserve to publish. The Federal Reserve's pricing principles provide that: (i) Federal Reserve services must be priced explicitly; (ii) Federal Reserve services must be made available to nonmember depository institutions at the same fee schedule applicable to Federal Reserve members except that nonmembers may have other requirements imposed, such as minimum balances; (iii) fees generally must be established on the basis of actual costs incurred plus certain imputed costs as if the services had been provided by a private sector firm, *e.g.*, return on capital; (iv) interest on items credited prior to collection must be charged at the then current Federal funds rate; (v) fees should be set so that revenues for major service categories match costs, inclusive of a private sector markup; (vi) service arrangements and related fee schedules must be responsive to changing needs for services in particular markets; and (vii) the structure of fees and service arrangements may be designed to improve both the efficient utilization of Federal Reserve services and to reflect desirable longer-run improvements in the nation's payments system. See 3 F.R.R.S. ¶¶ 7-132 to 7-134.

<sup>8</sup> 12 U.S.C. 4008.

prior to the time at which it was required to make funds available to its customer.<sup>9</sup>

Pursuant to the EFAA, the Federal Reserve promulgated Regulation CC, which, like the EFAA, applies to all depository institutions that provide check clearing services, including all of the banks participating in ECCHO. However, notwithstanding the Federal Reserve's rules to accelerate the collection and return of checks noted above, because the check collection process continues to be based on the physical transportation of paper checks, in a significant number of cases the availability schedules of the EFAA and Regulation CC require the depository bank to permit its customer to withdraw funds before the bank knows whether the check will be paid.<sup>10</sup>

<sup>9</sup> 12 U.S.C. 4008. These rules, among other things, establish requirements concerning: (i) the manner by which, the time within which and the location to which checks are to be returned (12 C.F.R. 229.30(a), 229.31(a)); (ii) markings to be placed on the fronts and backs of checks and returned checks (12 C.F.R. 229.30(d), 229.35); (iii) settlement for checks and returned checks (12 C.F.R. 229.31(c), 229.32(b), 229.36(f)); (iv) notices of non-payment to the depository bank and its customers (12 C.F.R. 229.33); and (v) inter-bank warranties and liability (12 C.F.R. 229.34, 229.38). Prior to the adoption of these Federal Reserve rules, the law governing private sector check collection primarily consisted of the Uniform Commercial Code ("UCC") and other state law. The Federal Reserve's rules supplement, and in many cases preempt, such state law. 12 C.F.R. 229.41. Examples of UCC provisions preempted in whole or in part by Regulation CC include UCC Sections 3-415, 4-202, 4-204(b)(1), 4-213(a), 4-214(a), 4-301, 4-302. References to the UCC are to the 1990 Official Text of the UCC.

<sup>10</sup> Under Regulation CC, for example, funds representing a check deposited on Monday at the depository bank and drawn on a paying bank located in the same geographic check processing region as the depository bank must be made available to the depositor for withdrawal by the opening of business on Wednesday of that week. 12 C.F.R. 229.12(b). However, the check (i) may not be received by the paying bank until after its close of business on Monday (considered under Section 4-108 of the UCC and Section 229.2(f) of Regulation CC to be received on Tuesday); (ii) the paying bank



If a check is subsequently dishonored after the depository bank has made the funds available to its customer, the bank is at risk because it may not be able to recoup the amount withdrawn by its customer.

In recent years, technological advances have enabled banks to transmit the payment information embodied in paper checks separately from delivering the paper checks, *i.e.*, through electronic transmission of data. By reducing reliance on the physical transportation of paper checks, payment information embodied in the checks can be transmitted more quickly and cheaply from the depository bank to the paying bank. The paying bank can, in turn, transmit information electronically to the depository bank as to whether such checks may or will be returned. Thus, use of electronics in the check collection process, among other benefits, reduces the banks' exposure because the depository bank can be advised much earlier than otherwise would be the case whether the check will be dishonored.

ECCHO has established the legal and operational framework under which its participating banks collect checks among themselves through the exchange of electronic information with the paper checks to follow. Through ECP, the depository bank can send payment

may not determine to return the check until late in the day on Wednesday as permitted under Section 4-301 of the UCC; (iii) the paying bank accordingly may not return the check until Wednesday night; and (iv) the depository bank accordingly may not receive the returned check until Thursday morning, a full day after it is required to make the funds representing the check available to the depositor for withdrawal. Under Regulation CC, the paying bank generally is required to return checks such that they are normally received by the depository bank (and for checks in amounts of \$2,500 or more, provide notice by any reasonable means to the depository bank that the check will be returned) by 4:00 p.m. on the second business day following the banking day on which the check was presented to the paying bank (*i.e.*, by 4:00 p.m. Thursday in the above example). 12 C.F.R. 229.30(a), 229.33(a).

information about a check directly to the paying bank and receive information about whether the check will be paid or dishonored the same or next day. Under such an arrangement, if the depository bank does not receive this same or next day notice that the check will be dishonored, it can permit its customer to withdraw its funds at that time with the knowledge that the check which its customer has deposited will ordinarily be paid. Obviously, ECP furthers Congress' goal, as reflected in the EFAA, of improving and accelerating the check collection process.

The Federal Reserve and ECCHO are currently the two principal providers of nationwide ECP services in the United States.

Under the Seventh Circuit's holding, the only federal forum available to a depository institution involved in an inter-bank dispute arising under the EFAA is the Federal Reserve.<sup>11</sup> Not only is such a result an incorrect interpretation of the EFAA, but it is also wholly inconsistent with the role established by Congress for the Federal Reserve as a competitor in the market for check clearing services.<sup>12</sup>

When Congress established the Federal Reserve in 1913, it authorized the Federal Reserve to provide check clearing services to its members to expedite the clearance of checks nationwide.<sup>13</sup> The role carved out for the Fed-

<sup>11</sup> The Seventh Circuit additionally recognized that such disputes could also perhaps be resolved by state courts. ECCHO does not believe that portion of the Seventh Circuit's holding to be relevant to the issue addressed in this brief—whether the federal forum for inter-bank disputes arising under the federal cause of action Congress provided in the EFAA is the federal courts or the Federal Reserve. For the reasons discussed in this brief, ECCHO believes that federal forum to be the federal courts.

<sup>12</sup> ECCHO does not reiterate in this brief the arguments presented by petitioner and *amici* the United States and the New York Clearing House Association.

<sup>13</sup> H.R. Rep. No. 69, 63rd Cong., 1st Sess., at 55-56 (1913).



eral Reserve was altered by Congress over the subsequent years as the payments system evolved, such that today, the Federal Reserve is required to provide its services to all depository institutions in a manner that permits other payments system participants to compete on an equal footing. Congress in the MCA established a competitive balance between the Federal Reserve and private sector providers with respect to payments services, including the electronic check collection services that the Federal Reserve and ECCHO today provide. Congress was aware of this delicate balance when it enacted the EFAA. It is inconceivable that Congress would have in the EFAA altered the balance it had so carefully constructed only seven years earlier by establishing a new role for the Federal Reserve, that of sole federal adjudicator of inter-bank check collection disputes, without expressly indicating by clear and unambiguous language in the statute or its legislative history that it had done so.

Forcing banks to look to their principal competitor to resolve at the federal level their private disputes under the EFAA, as contemplated by the Seventh Circuit, will inalterably tip the competitive balance established by the MCA toward the Federal Reserve, and against ECCHO and other private sector providers of payments services. The Federal Reserve has in Regulation CC adopted rules governing the private sector check collection and return process, including the ECCHO ECP process. Disputes between banks with respect to checks collected under the ECCHO system inevitably will involve disputes under these Regulation CC rules. Requiring banks to resort to a Federal Reserve adjudicatory procedure to resolve these disputes at the federal level could require a bank to reveal to ECCHO's principal competitor confidential and proprietary business information, the revelation of which could be competitively harmful to ECCHO and the banks participating in the ECCHO system. In addition, the threat that a principal competitor will be reviewing the details of and judging the specific actions, procedures and

responses of a bank in the context of a specific check transaction or transactions will likely deter banks from vigorously pursuing their legitimate claims in a federal forum. The end result of the Seventh Circuit's decision is that banks that are participants in the payments system will be forced to choose between remaining dynamic competitors of the Federal Reserve or zealously asserting their claims in the manner intended by Congress. Given the absence of a direct statutory delegation of adjudicatory authority to the Federal Reserve by Congress, or even a single mention in the legislative history, this cannot be what Congress intended when it enacted the EFAA.

### CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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August 31, 1995

## **APPENDIX**

**APPENDIX****ECCHO MEMBERSHIP  
AS OF AUGUST 31, 1995**

Banco Central Hispano  
Bank of America Arizona  
Bank of America California  
Bank of America Illinois  
Bank of America Texas  
Bank of America Washington  
Bank of California  
Bank of Hawaii  
Bank of New York  
Bank One, Columbus  
Bank One, Kentucky  
Bank One, Texas  
Bankers Trust  
Barnett Bank of Jacksonville  
Barnett Bank of South Florida  
Boatmen's National Bank  
Chase Manhattan Bank (Connecticut)  
Chase Manhattan Bank (Delaware)  
Chase Manhattan Bank (Maryland)  
Chase Manhattan Bank (New York)  
Chemical Bank  
Citibank, Delaware  
Citibank, N.A.  
Comerica (Michigan)  
CoreStates  
Firstar, Milwaukee  
First Fidelity Bank  
First Interstate Bank of Arizona  
First Interstate Bank of California  
First Interstate Bank of Denver  
First Interstate Bank of Nevada  
First Interstate Bank of Oregon  
First Interstate Bank of Texas  
First Interstate Bank of Washington



First National Bank of Boston  
First National Bank of Chicago  
First Tennessee Bank  
First Union Bank (plus 7 affiliates)  
Frost National Bank of San Antonio  
Harris Trust & Savings Bank  
Key Bank of Oregon  
Key Bank of New York  
LaSalle National Bank  
Marine Midland Bank  
Mellon Bank  
Mercantile Bank St. Louis  
NationsBank (DC)  
NationsBank (Florida)  
NationsBank (Georgia)  
NationsBank (Maryland)  
NationsBank (North Carolina)  
NationsBank (South Carolina)  
NationsBank (Tennessee)  
NationsBank (Texas)  
NationsBank (Virginia)  
Northern Trust Company  
Norwest Bank Denver  
Norwest Bank Iowa  
Norwest Bank Minnesota  
PNC Bank  
SeaFirst Bank  
Shawmut Bank, N.A. (Boston)  
Shawmut Bank, Connecticut N.A.  
Signet (Virginia)  
Texas Commerce Bank  
U.S. Bank of California  
U.S. Bank of Oregon  
U.S. Bank of Washington  
Union Bank  
United Jersey Bank  
Wells Fargo Bank